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No. 00-1073

IN THE

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, A/K/A OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as superintendent; LYNN JOHNSON, individually and in her official capacity as assistant superintendent; RICK THOMAS, individually and in his official capacity as principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE [1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

in 1981. Eagle Forum ELDF's mission is to enable conservative and pro-family citizens to participate individually and collectively in the process of self-government and public policy making, so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. In particular, Eagle Forum ELDF defends the rights of parents in connection with the public school system.

SUMMARY OF ARGUMENT

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2001) (hereinafter "FERPA" or "the Act") provides essential protection to "the privacy of students and their parents" in our historically compulsory school system. *Falvo v. Owasso Indep. School Dist.*, 233 F.3d 1203, 1211 (10th Cir. 2000). FERPA protects their privacy with respect to increasingly intrusive demands for information by public schools. The Act was one of the first and arguably the most successful federal privacy legislation, which in recent years has extended to financial records, *see* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999), and to medical records, *see* Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936. Efforts to change FERPA or the other privacy legislation should be directed at Congress, not the courts.

Petitioners insist here on using a peer grading practice that is error-prone at best, and counterproductive at worst. In defending peer grading methods, petitioners threaten the effectiveness of FERPA in protecting families for nearly 3 decades. Petitioners ask this Court, not Congress, to narrow FERPA to allow peer grading, with those grades then announced to the entire class. FERPA should not be judicially narrowed, and parental rights sacrificed, on these facts.

FERPA is clear and unambiguous in protecting the "education records" of students against involuntary disclosure. Compromise of that confidentiality is neither justified for reasons of expediency nor for experimental teaching techniques. This right of confidentiality is an essential bulwark against the growing use of public schools and testing to inculcate attitudes and collect personal information. This right also serves to protect against the delegation of teaching obligations to unapproved and unqualified instructors for publicized grading.

Erosion of student and parental privacy rights is particularly unwarranted in the compulsory context of public schools. Parents are effectively the employers, by compulsion rather than choice, of the school employees who instruct and maintain records about the minor students. Generally required to participate, families are entitled to enforce and obtain their benefit of the bargain, including the privacy guaranteed by FERPA. Section 1983 relief to enforce Rule of Law in this context must remain available to families.

ARGUMENT

FERPA means what it says: protected "education records" are "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution . . . ." 20 U.S.C. § 1232g(a)(4)(A). Its definition is clear and broad. If the records "are maintained" by the school or its agent, then they must be protected. Neither the legislative history, the brief by the Solicitor General, nor the apocalyptic predictions by petitioners and *amici* can narrow that broad statutory mandate now. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). Part I below defends adherence to the plain meaning of the statute.

The court below was also correct in finding a 42 U.S.C. § 1983 cause of action here, which is particularly warranted due to the compulsory nature of public schooling. Petitioners do not challenge Section 1983 recourse, and it need not be addressed here. At any rate, the limited and non-exclusive enforcement scheme of FERPA permits Section 1983 recourse under well-established precedents. Part II explains why families must continue to retain a Section 1983 cause of action for violations of FERPA.

I. FERPA PROTECTION OF "EDUCATION RECORDS" IS UNLIMITED IN TIME OR PROCESS.

The restriction on disclosure by schools of education records is not limited in time or process. The restriction against disclosure of education records applies *at all times* and to *all school officials*. Schools are not free to bypass FERPA based on when or how they gather and maintain the records. As explained in Part A below, and emphasized by the Court below, FERPA does not include an exception allowing disclosure slightly prior to transferring the information to a centralized filing system. The teacher cannot broadcast that Johnny received a "D" on a history test a few seconds before transcribing that grade in his permanent file.

Nor is FERPA limited in scope based on the identity of the agent disclosing the information. A school cannot send Jill to fetch the results of Jack's school-required drug tests and pretend not to be responsible for embarrassing consequences. Where, as here, a school insists on using students to substitute for teachers in grading papers, the school must still comply with FERPA, as discussed in Part B below.

The Solicitor General's argument for a novel and narrow interpretation of FERPA does not withstand scrutiny. Part C demonstrates the flaws in that interpretation, which has logical defects and violates the statute. Moreover, the

Solicitor General's view inexplicably conflicts with the longstanding, consistent implementation of FERPA by the Department of Education's Family Policy Compliance Office (FPCO).

Construing FERPA broadly has worked extraordinarily well for nearly three decades, and the dire consequences predicted by petitioners and *amici* are illusory. FERPA has protected the political process, as in the examples of Vice President Quayle and President Clinton, against potentially embarrassing disclosure of candidates' education records. It has even helped preserve the integrity of the judiciary by preventing disclosure of education records at sensitive times. In this case, FERPA also has the positive effect of encouraging teachers themselves to grade student work, rather than using the weak substitute of classmates as graders. As shown in Part D, none of the catastrophes predicted by petitioners or *amici* are realistic.

Congress, not the courts, is the proper venue for seeking change to the plain meaning of FERPA. *See Ron Pair Enter.*, *supra*.

A. The FERPA Restrictions on Disclosure Apply at All Times.

FERPA defines its key term "education records" based on the type of information, not when it was received by the teacher or administrator. 20 U.S.C. § 1232g(a)(4). The touchstone is whether the materials "contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A). It is the *type* of information, not when it was received or disclosed, that determines application of FERPA.

Grades on coursework fall squarely within the plain meaning of the Act. Coursework grades are "directly related to a student," and thus satisfy the first prong of the

requirement. The grades at issue here were also maintained by a person acting for an educational institution—to wit, the teacher. It is inconsequential to the statute whether the disclosure occurs slightly before the teacher recorded the information. *See Falvo*, 233 F.3d at 1216 ("Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book. . . . [I]t would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book . . . .").

Petitioners argue that:

> Until the paper has been scored and the number of correct or incorrect answers totaled, there exists no 'record' to be 'maintained.' If Congress had meant for the word 'maintain' to include the creation or collection of information, it certainly would have said so. Under the plain and ordinary meaning of the word 'maintain,' only those final grades that are recorded on the student's transcript and preserved in the educational agency's permanent, institutional records are 'maintained' within the meaning of FERPA.

Pet. Br. at 17. But Petitioners' conclusion is a non sequitur, even if no "record" exists until the paper has been graded. The papers are graded and the teacher does "maintain" the grades under the plain meaning of that word, and thus FERPA protects those grades. Congress need not enact special protection for "creation" or "collection of information", nor for information concerning papers prior to grading, to ensure protection.

Petitioners then argue that:

> The Tenth Circuit interpreted 'maintain' to mean the creation of information that may be preserved for a brief period of time to allow the teacher to make some use thereof. Yet by that logic, a student's work on a chalkboard could be an education record, because it is

> 'maintained' until the teacher has checked the work and given the student permission to erase it.

Pet. Br. at 18. But this does not accurately restate the decision below. Rather, the Tenth Circuit effectively enforced the plain meaning of the statute: grades, if maintained, must be protected. *See Falvo*, 233 F.3d at 1216-18. Non-graded material is unaffected by the decision below.

B. FERPA Restrictions on Disclosure Apply to Any "Person Acting for" an Educational Institution.

FERPA prohibits disclosure of statutory "education records" regardless of which school employee gathers or maintains the records. If the information is "maintained by an educational agency or institution or *by a person acting for such agency or institution*," then it is protected by FERPA. 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added). Anyone acting under delegation from an institution, such as a teacher, must still adhere to FERPA. The plain meaning of the statutory language is conclusive. *See Ron Pair*, 489 U.S. at 242 ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *Herman v. Hector I. Nieves Transport, Inc.*, 244 F.3d 32, 34 (1st Cir. 2000) ("In the absence of ambiguity, we generally do not look beyond the plain meaning of the statutory language.") (citing, *inter alia*, *Campbell v. Washington County Techn. Coll.*, 219 F.3d 3, 6 (1st Cir. 2000)).

The FPCO of the Department of Education has authority to implement FERPA, but the Solicitor General now inexplicably argues for a rejection of FPCO's own interpretation:

> Although the Department of Education previously has expressed a view of 'education records' that includes

> student work once it is collected by the teacher, we have concluded, on the basis of our review of the relevant statutory materials, as discussed below, that FERPA does not reach student work unless they [sic] are maintained as institutional records of the school.

Govt. Br. at 14 n.6 (reference omitted). This is error, both procedurally and substantively.

Substantively, FERPA does expressly govern student work maintained by a person, such as a teacher, who acts for an educational institution. 20 U.S.C. § 1232g(a)(4)(A)(ii). The narrow interpretation proposed by the Solicitor General would allow teachers to gather and disclose highly personal grades about students with impunity. A teacher could even disclose graded student work itself to the public, without prior consent, under this narrow view. That would violate both the plain meaning and spirit of FERPA.

Procedurally, it is unfortunate that the government fails to defend FPCO precedents here. Instead, the Solicitor General rejects the longstanding positions of the FPCO and argues for broad rights of teachers at the expense of parents and students. *See* Govt. Br. at 34 n.17 (arguing that teacher grade books should be exempt from FERPA). The Solicitor General even declares that its view "represents the position of the United States on this issue," unnecessarily throwing into uncertainty the continued vitality of the FPCO precedents, as discussed further below.

If there is to be any narrowing of FERPA, it should be done by Congress, not the courts or the Solicitor General.

C. The Solicitor General's Novel Interpretation is Flawed and Conflicts with FERPA and Longstanding Precedents.

The Solicitor General argues for a novel, and logically flawed, interpretation of FERPA. The government brief suggests that "student homework or classroom work" should

not qualify as records within the meaning of FERPA if not "retained or preserved as institutional records." Govt. Br. at 11. But such approach would fail to protect final and midterm exam grades and the exam papers themselves, which are often the most sensitive student records of all. This approach requires holding that teachers are not school officials, in direct conflict with FERPA and longstanding precedents of the Department of Education.

Many institutions, for example, allow students to take courses as "Pass/Fail" or otherwise conceal their exam grades from their permanent records. These options implicitly recognize the privacy interests in exam grades. However, the Solicitor General's interpretation would effectively deny the privacy of exam grades, while instead protecting the less meaningful course grades.

The government brief avoids the issue of exam grades. FERPA prevents a teacher from disclosing final exam grades, and likewise guarantees students access to their own final exam grades. The Act prohibits the posting, for all to see, of individually identifiable final exam grades, even if limited to grades that do not match an administrative record. Yet the Solicitor General's interpretation ignores the spirit and letter of FERPA, so that teachers could deny students access to their own grades while distributing those same grades to others.

That interpretation conflicts directly with FERPA, which expressly includes a teacher within its meaning of the term "school official." 20 U.S.C. § 1232g(b)(A) ("other school officials, *including teachers within the educational institution or local educational agency*") (emphasis added). Grades are highly personalized information, and FERPA ensures their protection and family access regardless of whether a teacher or other school official stores them.

The Solicitor General's interpretation is also flawed with respect to a student's school work, which requires parental

access as much as the grades assigned to the work. Family access to this work cannot be a function of where the school physically keeps that work. Parents are entitled under FERPA to access their children's work for which teachers record grades, with this access guarding against biased testing and grading. Yet the Solicitor General effectively argues for denial of FERPA access if a school official holds the student work in a place different from the central administrative files of the school. Govt. Br. at 11-14 & n.6. If the school uses a distributed filing system for student work, then that approach eviscerates FERPA.

The FPCO has interpreted and applied FERPA successfully for decades, but the Solicitor General's novel interpretation conflicts with its long-standing and well-reasoned precedents. The government brief specifically references and rejects two letter rulings of FERPA that held in favor of parents, and also rejects other unidentified letter rulings of FERPA. Govt. Br. at 34 n.17 (citing two identified letters by Leroy S. Rooker, and alluding to others). The government brief criticizes specific letters without attaching them, which we remedy here.

The Solicitor General first rejects a letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr. Julio Almanza (Jan. 28, 2000), which properly applied FERPA to protect privacy interests in student work collected by the teacher (App. at 1a). "FERPA would not generally permit a teacher to conduct a classroom learning exercise in which the teacher discloses personally identifiable information from one student's education records to one or more of the other students." *Id.* at 6a. This FPCO interpretation adheres to the spirit and letter of FERPA. Promulgated in January 2000, this advice in favor of family rights has not caused any known problems.

The Solicitor General next rejects a letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr.

Andrew Marko (June 25, 1998), which properly applied FERPA to guarantee parents' access to records maintained about their child by the teacher (App. at 9a). Govt. Br. at 34 n.17. In that case, a teacher refused to allow the parents to see records he maintained about their child. The case illustrates how schools often take an adversarial position against reasonable parental requests, and how essential FERPA is for parents. The public schools are taxpayer-funded for students effectively compelled to attend, and yet parents are often denied access to records gathered and maintained in this environment. FPCO has consistently applied FERPA to uphold parental rights in this and numerous other instances, which the Solicitor General unjustifiably seeks to reverse. *Id.*

D. The Predicted Catastrophes for a Broad FERPA Are Illusory.

The predictions that the sky will fall, if the ruling below is affirmed, are grossly exaggerated. *Amicus* Oklahoma Education Association, for example, insists that solo band performances, verbal presentations, the Socratic methodology of teaching, and "[a]ny routine pedagogical teaching and learning tool or practice" may be deemed a FERPA violation under the ruling below. OK Ed. Assoc. Br. at 16-17.

Petitioners declare that "[i]t is difficult to imagine how some courses could be conducted under the Tenth Circuit's reasoning. . . . Every student in the band or orchestra knows who is first chair on any instrument. . . . Moreover, the Tenth Circuit's decision would prohibit teachers from grading projects assigned to teams of students on the basis of the team's performance, because if the teacher gives a 'team grade,' everyone on the team will know that his or her teammates received the same grade." Pet. Br. at 36.

Amici National School Boards Association et al. go even further by claiming that "a vast, indeed staggering, amount of

ordinary communication between students and teachers" would become subject to FERPA under the decision of the court below. *Amici* National School Boards Ass'n Br. at 7. "A teacher could not compliment a child's artwork in the presence of other students were the compliment later recorded in an evaluation. And countless other illustrations of conventional and proper educational interaction would be forbidden." *Id.*

Not to be outdone, the Solicitor General worries about "the public display of science projects, the posting of a classroom chart that records the number of books read by each student throughout the school year, or ... the teachers' posting of homework or classroom assignments." Govt. Br. at 19.

Missing from these Chicken Little predictions, however, is any reference to disclosures of actual individual course grades. The ruling below does not affect presentations in front of class, posting of assignments, display of science projects, or any of the other suggested extrapolations. It does not affect team grades. The ruling below only applies to protecting privacy in grades of individuals which are recorded by the teacher. Such protection does not disrupt legitimate educational activities. As to petitioners' claim that chalkboard work could be affected, it is erased and hence not "maintained" as specified by FERPA.

These criticisms are moot anyway, because parental consent exists for virtually all positive public teacher feedback on student performance, from attaining first chair in the orchestra to being listed on the honor roll. Negative feedback on students, by announcing poor grades, rarely happens. To the extent a public school insists on publicizing poor grades, FERPA provides privacy protection without affecting the other activities cited by petitioners and their *amici*.

II. SECTION 1983 RECOURSE ALLOWS ENJOINING VIOLATIONS OF CLEARLY ESTABLISHED STATUTORY RIGHTS IN THE COMPULSORY CONTEXT OF PUBLIC SCHOOL.

Petitioners did not appeal the application of Section 1983 here, and do not even raise it in their brief. This Court need not address it. *See New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting) ("I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review."). Undeterred, several *amici* raise this issue, and argue for precluding victims of FERPA violations from enjoining continuing violations. As explained below, Section 1983 recourse here falls well within the Supreme Court requirements for its application.

Moreover, families are generally compelled to finance and attend public schools. *See Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (affirming the "general applicability of the State's compulsory school-attendance statutes," while carving a narrow religious exception). Once compelled, families need Section 1983 recourse as self-defense. The privacy interests in student records are at least as significant as the privacy interests in other personal information that this Court has recognized. *See Whalen v. Roe*, 429 U.S. 589, 598-600 (1977); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59 (1977).

A. FERPA Satisfies the Three-Part Test for the Applicability of Section 1983.

FERPA easily satisfies the three-part limitation on Section 1983 actions. First, Section 1983 is inapplicable when the statutory provision at issue was not "'intend[ed] to benefit the putative plaintiff.'" *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990) (quoting *Golden State Transit Corp. v. Los*

Angeles, 493 U.S. 103, 106 (1989)). Second, Section 1983 is unavailable when the statute "reflects merely a 'congressional preference' for a certain kind of conduct, rather than a binding obligation on the governmental unit," *Wilder*, 496 U.S. at 509 (quoting *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)). Third, the plaintiff's interest cannot be so "'vague and amorphous'" as to be "'beyond the competence of the judiciary to enforce.'" *Wilder*, 496 U.S. at 509 (quoting *Golden State*, 493 U.S. at 106, quoting *Wright v. Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 431-432 (1987)). *See also Dennis v. Higgins*, 498 U.S. 439, 448-49 (1991) (quoting and applying the three-part test as stated in *Golden State*).

None of these limitations applies to victims of FERPA violations. FERPA was indisputably designed to benefit and protect students, who are directly hurt by its violations. *See* 120 Cong. Rec. 39862 (Dec. 13, 1974) (Joint Statement in Explanation of Buckley/Pell Amendment) ("The purpose of the Act is two-fold—to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent."). That suffices for the purposes of Section 1983. As a noteworthy by-product, FERPA also benefits the political process by preventing manipulative and distorting disclosures of embarrassing education records about candidates and judicial nominees.[2]

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[2] Political objections to judicial confirmation sometimes resort to mockery of intellect, as directed at Supreme Court nominee Judge G. Harrold Carswell, whom the Senate narrowly rejected by a 51-45 vote. Floor manager Roman Hruska (R-NE), biting the bait, doomed it: "Even if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?" *Nominations*, Senate Briefings, U.S. Senate, http://www.senate.gov/learning/brief_3.html (viewed 9/12/01).

As to the second prong of the test, FERPA does specifically bind government to protect the privacy of education records. Indeed, the FERPA requirements are expressly directed at government. They apply to "any educational agency or institution" receiving federal funds, 20 U.S.C. § 1232g(a), "any State educational agency," *id.* § 1232g(b), and "any public ... agency or institution which is the recipient of funds under any applicable program." *Id.* § 1232g(a)(3).

The nature of those obligations is clear and unambiguous, and does not suffer from problems of vagueness. The educational agency or institution is prohibited, *inter alia*, from "releas[ing] education records . . . of students without the written consent of their parents to any individual, agency, or organization" other than specifically excepted entities. *Id.* § 1232g(b)(1). Regulated schools, as custodians of highly personal education records, have a statutory obligation not to injure students and families through unauthorized release of those records.

FERPA thereby overcomes the three-part limitation above by imposing a clear obligation on government to respect privacy rights in education records. Students are typically minors required by government to provide the protected information. The reasonable expectation of privacy by families in these records is at least as great as the recognized expectation of privacy in other highly personal information. *See Whalen*, 429 U.S. at 599 (noting, in the context of medical records, that one has "the individual interest in avoiding disclosure of personal matters"); *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387-88 (10th Cir. 1995), *cert. denied*, 516 U.S. 817 (1995) (applying Section 1983 recourse to deceased spouse's diary excerpts).

Amici misplace reliance on *Suter v. Artist M.*, 503 U.S. 347 (1992), in arguing that FERPA does not surmount the above limitation. In *Suter*, the issue was whether the Adoption Assistance and Child Welfare Act of 1980 conferred

broad discretion on the States in administering foster care and adoption services. *See id.* at 362. In sharp contrast with FERPA, the Act in *Suter* merely required that "reasonable efforts will be made" by States to minimize dislocation of children from their families. *Id.* at 351, 358. Because the State had broad discretion in administering the program, the Court held that a Section 1983 private cause of action does not exist. *See id.* at 361-63. But where, as here, the federal statute is clear and unambiguous, victims of violations can sue to ensure adherence to the applicable law.

Amici are also mistaken in relying on *Blessing v. Freestone*, 520 U.S. 329 (1997). There the plaintiff sought, under Section 1983, blanket enforcement of an entire statutory scheme. In denying Section 1983 relief, the Court reaffirmed that the issue is the clarity and specificity of the obligation, not the existence of an express private cause of action. This Court drew a distinction between Section 1983 cases brought to enforce specific and narrow statutory provisions and suits for blanket enforcement of an entire statutory scheme. This Court thereby distinguished *Blessing* from *Wright*, in which plaintiffs were seeking to enforce a particular statute on rents, not the entire United States Housing Act.

B. It is the Clarity of the Statutory Obligation, Not an Express Cause of Action, that Establishes the Section 1983 Right.

It is the clarity of the statutory obligation, not an express private cause of action, that establishes the Section 1983 right to enforce the statute. Section 1983 protects against "deprivation of any rights, privileges, or immunities, secured by the Constitution and laws." 42 U.S.C. § 1983. The touchstone is whether those "rights, privileges, or immunities" are clearly "secured by the Constitution and laws," not whether they have an explicit private cause of action in the statute. The plain meaning of Section 1983 hinges on the clarity of the rights, not on a private right of enforcement. The

Constitution itself lacks explicit private causes of action, as do many of the laws to which Section 1983 rightly applies. *See, e.g., Kellogg v. City of Gary*, 562 N.E.2d 685, 696 (Ind. 1990) ("[W]e now hold there is a state created right to bear arms which includes the right to carry a handgun with a license, provided that all of the requirements of the Indiana Firearms Act are met. This right is protected by the Due Process Clause of the Fourteenth Amendment and is both a property and liberty interest for purposes of § 1983.").

Reinterpreting Section 1983 to apply only where the statute provides a private cause of action is undesirable in addition to being unprecedented. It would improperly shift the inquiry and focus from the clarity of the obligation to the existence of an explicit private cause of action. Section 1983 has and always will apply to "rights, privileges, or immunities" that lack an explicit private cause of action. Its limitation should be to those "rights, privileges, or immunities" that are clearly defined by law. The mischief to be avoided in Section 1983 actions is with respect to vague obligations, whereby the judiciary is effectively asked to create the substantive law. Here the legal obligation is clear, and there is no reason to allow violations of that obligation by denying Section 1983 actions.

Section 1983 enables victims of continuing FERPA violations to move directly to enjoin them, rather than taking the circuitous and perhaps impossible tack of suing the federal government to compel it to comply with FERPA. Rule of Law is enhanced by allowing Section 1983 recourse here.

C. The Enforcement Scheme of FERPA Does Not Preclude a Section 1983 Cause of Action.

Congress established a simple, non-exclusive administrative enforcement scheme under FERPA. It has two parts: first, the Secretary is required to enforce the statute but, second, the Secretary is prevented from taking immediate,

effective action such as withholding funds. This statutory framework reinforces the need for Section 1983 recourse, and cannot be read to preclude such an action.

In *Blessing*, this Court held that denial of a Section 1983 cause of action is warranted if Congress specifically foreclosed a Section 1983 remedy either (1) expressly by forbidding recourse to Section 1983 in the statute itself or (2) implicitly by creating a comprehensive enforcement scheme that is incompatible with individual Section 1983 enforcement. *Blessing*, 520 U.S. at 341 (citing *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1994); *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1984)). As shown below, denial of a Section 1983 right is not justified here for either reason.

1. *FERPA Lacks an Express Prohibition on Section 1983 Recourse.*

Congress established mandatory, non-exclusive enforcement of FERPA by the Secretary of Education. "The Secretary shall take appropriate action to enforce this section . . . . " 42 U.S.C. § 1232g(f).

This mandate supports, rather than conflicts with, a Section 1983 cause of action for violation of FERPA. A private party would only recover under Section 1983 when (1) the Secretary fails to comply with its mandatory FERPA obligation or (2) the Secretary does comply but the school ignores him and continues to violate FERPA. Both scenarios are realistic possibilities in light of the state-conferred monopoly power held by public schools. When the school and the Secretary are in compliance with the Act, then a Section 1983 right is inconsequential.

At any rate, FERPA lacks an express prohibition on Section 1983 recourse.

2. *FERPA Lacks an Implicit Prohibition on Section 1983 Recourse.*

In *Blessing*, this Court held that without an express statutory curtailment of Section 1983 recourse, a defendant "must make the difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" 520 U.S. at 346 (quoting *Golden State*, 493 U.S. at 107 (citation and internal quotation marks omitted)). FERPA lacks a "carefully tailored scheme" inconsistent with Section 1983 recourse.

The *Blessing* holding continued:

> Only twice have we found a remedial scheme sufficiently comprehensive to supplant §1983: in [*Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981)], and *Smith v. Robinson*, 468 U.S. 992 (1984). In *Sea Clammers*, we focused on the "unusually elaborate enforcement provisions" of the Federal Water Pollution Control Act, which placed at the disposal of the Environmental Protection Agency a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties. 453 U.S., at 13. We emphasized that several provisions of the Act authorized private persons to initiate enforcement actions. *Id.*, at 14, 20.

520 U.S. at 347. In *Sea Clammers*, the Court "found it 'hard to believe that Congress intended to preserve the §1983 right of action when it created so many specific statutory remedies, including the two citizen suit provisions.' 453 U.S., at 20." 520 U.S. at 347.

In *Smith*, the enforcement scheme of the Education of the Handicapped Act "permitted aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review." *Id.* (citing 468 U.S. at 1009).

The *Blessing* Court emphasized that an administrative enforcement scheme does not preclude a Section 1983 cause of action:

> We have also stressed that a plaintiff's ability to invoke §1983 cannot be defeated simply by "[t]he availability of administrative mechanisms to protect the plaintiff's interests." *Golden State*, *supra*, at 106. Thus, in *Wright*, we rejected the argument that the Secretary of Housing and Urban Development's "generalized powers" to audit local public housing authorities, to enforce annual contributions contracts, and to cut off federal funding demonstrated a congressional intention to prevent public housing tenants from using §1983 to enforce their rights under the federal Housing Act. 479 U.S., at 428. We reached much the same conclusion in *Wilder*, where the Secretary of Health and Human Services had power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law. 496 U.S., at 521. Even though in both cases these oversight powers were accompanied by limited state grievance procedures for individuals, we found that §1983 was still available. *Wright*, 479 U.S.at 427-428; *Wilder*, 496 U.S. at 523.

520 U.S. at 347-48.

The Court found the enforcement scheme in *Blessing* to be, as here, "through the Secretary's oversight." *Id.* at 348. Specifically, "up to 25 percent of eligible children and custodial parents can go without most of the services enumerated in Title IV-D before the Secretary can trim a State's AFDC grant. These limited powers to audit and cut federal funding closely resemble those powers at issue in *Wilder* and *Wright*." *Id.* The government's argument that a private plaintiff lacked standing to compel specific performance by the Secretary even reinforced the need for Section 1983 recourse. *Id.* The Court concluded that "[t]o the extent that Title IV-D may give rise to individual rights, therefore,

we agree with the Court of Appeals that the Secretary's oversight powers are not comprehensive enough to close the door on §1983 liability." *Id.*

The FERPA enforcement scheme here is even less comprehensive than the one at issue in *Blessing*, which was insufficient to preclude a Section 1983 action. Under FERPA, the Secretary of Education may not impose any fines for violations and cannot withhold or terminate *any* assistance in the first instance. "[A]ction to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 1232g(f). The Secretary has a procedural obstacle of determining that "compliance cannot be secured by voluntary means," which can take months or, more likely, years. *Id.* This renders the Secretary virtually powerless to assist a specifically injured student in enjoining a specific violation. While FERPA also authorizes the Secretary of Education to "establish or designate an office and review board within the Department" to investigate, process, review, and adjudicate FERPA violations, *see id.* § 1232g(g); 34 C.F.R. §§ 99.60-67, the remedy remains the limited one above. *See* 34 C.F.R. § 99.67 (2001).

FERPA therefore lacks a comprehensive enforcement scheme that would implicitly preclude Section 1983 relief.

D. Section 1983 Recourse is Also Necessary Due to the Compulsory Nature of Public Schools.

The public school system, the primary focus of FERPA, is not comparable to public assistance programs for which Section 1983 application has been rightly questioned. *See, e.g.*, *Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring) (suggesting, in the context of a government assistance program, that recipients lack Section 1983 recourse as third-party beneficiaries).

Public schools represent the converse of government assistance programs. Families and taxpayers are required to fund the schools that their children then attend, typically by operation of law. *See, e.g., Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (requiring greater funding of certain schools in New Jersey); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989) (requiring greater support of certain schools in Texas, because "the legislature's responsibility to support public education is . . . constitutionally imposed"). The direct financial beneficiary of school funding is the school staff, not families with children there.[3] Indeed, for numerous schools it is debatable whether families even receive in value what they must spend. This is in sharp contrast to public assistance programs, where the recipients do receive a net financial benefit from the federal funding, and retain full choice whether to participate or not.

FERPA constitutes a mandate, through the political process, that contractors (the schools) respect parental instructions with respect to private records. *Cf. LePage v. Wyoming*, 18 P.3d 1177, 1181 (Wyo. 2001) (in affirming parental rights against State intrusion in schools, the Wyoming Supreme Court declared that "we . . . are confident in our presumption that parents act in the best interest of their children's physical, as well as their spiritual, health"). Students and their families are not the third-party beneficiaries suggested in *Blessing*. Rather, families are analogous to an employer, and FERPA is akin to a code of conduct for their employees—the school staff. Families, when unsatisfied, lack the option of terminating the relationship, so Section 1983 recourse is essential. *See, e.g., Fay v. South*

[3] *See Average Costs of a California School 1998-99*, California Dept. of Ed., http://www.ed-data.k12.ca.us/edfact_967.asp (viewed 9/13/01) (average cost per public school student in California is about $6000, the vast majority of which funds teacher and administrative staffs and consultants).

Colonie Cent. Sch. Dist., 802 F.2d 21, 33-34 (2d Cir. 1986) (relying on Section 1983 for redress against an overt violation of FERPA by a school).

The arguments by *Amici* National Education Association *et al.* and National School Boards Association *et al.* against a Section 1983 remedy have the school relationship backwards. Families fund schools, not vice-versa. Teachers are not required to attend public schools; families are required to fund them and participate. If teachers are unhappy with the prevailing code of conduct required by FERPA, then they can change jobs. Families do not generally have that option. As this Court has observed, extended compulsory education and enormous funding of public schools is a relatively recent development in American history. *See Yoder*, 406 U.S. at 226 (noting that until at least 1910, students generally satisfied State educational requirements by completing elementary school).

The contractual analogy suggested in the *Blessing* concurrence would only apply here as follows. Families are the payers, as required by law; school staffs would be the payees and beneficiaries. FERPA simply represents another channel for families to pay money to school staffs, while attaching modest conditions to protect privacy. In such a relationship, families and the Secretary each retain the right to direct the payees, just as a principal and his agent can each direct a contractor.

No anomaly exists here in allowing Section 1983 recourse in the absence of a private cause of action. In the public school context, there are no putative private entities that would enjoy immunity relative to a governmental counterpart. Petitioners and *amici* cannot have it both ways, implicitly defending compulsion on one hand but then arguing against a Section 1983 remedy on the other.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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October 12, 2001

APPENDIX

APPENDIX

UNITED STATES DEPARTMENT OF EDUCATION

Mr. Julio Almanza
Superintendent
Duluth Public Schools, ISD#709
215 North 1st. Avenue East
Duluth, Minnesota 55802

Jan 28 2000

Complaint No.____
Family Educational Rights
and Privacy Act

Dear Mr. Almanza:

This is to inform you of the finding in the complaint filed with this Office against the Duluth Public Schools, ISD#709 (District) by Ms.___. Ms. ____ alleged that the District violated the Family Educational Rights and Privacy Act (FERPA) when it disclosed personally indentifiable information from the education records of her daughter, ____, to a third party without her prior written consent. Specifically, Ms. ____ stated:

> My child's records were improperly disclosed. On October 6, 1998, Ms. ____ [a teacher at Ordean Middle School] handed out English tests taken by students on a previous day. These tests were given to other students to correct. Another student graded my daughter's test. My daughter's test was an education record and was improperly disclosed by giving it to another student. . . .

By letter dated February 16, 1999, this Office informed you of Ms. ____'s allegation and asked that the District provide a written response. Ms. Elizabeth A. Storaasli, attorney, responded on behalf of the District by letter dated March 19, 1999. In her letter, Ms. Storaasli states:

> Complainant ____ met with Superintendent Julio Almanza on October 7, 1998 with regard to her concerns about correcting of student tests in class. At that time she

did not specifically identify any teacher by name or classroom by location where the alleged violation occurred. She did not specify any incident which violated FERPA. She directed a letter to Superintendent Almanza dated October 13, 1998 which made general objection to student involvement in reviewing homework papers and tests, however, she identified no specific teacher or classroom in which this had allegedly happened.

The Complaint set forth in Director Rooker's letter dated February 16, 1999 is the first communication in which _____ identified Teacher _____ of Ordean Middle School as the source of _____ concern. Unfortunately, the delay in identifying the specific incident and data about which _____ complains has made it virtually impossible for Teacher _____ . . . to identify the test in question on October 6, 1998. ISD No. 709 maintains that the Complaint is too vague and thus places the School District and teacher in a position that essential factual information in order to respond to a nonspecific complaint is no longer available.

By letter dated November 30, 1999, this Office asked Ms. ____ to identify more specifically, which of her daughter's tests she is alleging that the District improperly disclosed. Ms. ____ stated that she could not identify any specifics regarding the test due to the passage of time since she submitted her complaint.

In her March 19 response on behalf of the District, Ms. Storaasli states further:

> ____ teaches Enriched English for eighth graders. She indicates that ____ . . . has been in her class during the 1998-1999 school year. She indicates that she administers approximately 4 to 5 tests per week in her English class . . . Teacher ____ has a weekly spelling

test which is preceded by practice tests or pre-tests. During the pre-tests the teacher dictates the words for the students, the students exchange papers, and identify for each other the words that are spelled correctly . . . . No grades are recorded of the practice tests, and there are no totals kept and no grades are assigned to those tests. Teacher ____ indicates that final weekly spelling tests are corrected only by the teacher not by other students, and then passed directly back to the students after being folded to cover the grade.

Teacher ____ also administers weekly vocabulary tests of 10 points each, but these are not corrected by students and are handed back in the same manner.

Teacher ___ also periodically administers chapter tests based upon current curriculum such as short stories . . . If student grading is involved in those tests, it is only on selected minor portions such as true-false, matching, etc., and students correcting are never aware of the student's totals or grade assigned by the teacher after correction of the entire test.

Teacher ____ indicates that as to those tests that are recorded in her grade book, after she has graded the number correct on each test and recorded the number in her grade book, she calculates the students' results on a curve, and posts the curve number on the blackboard with the indication of what number grades apply to the curve. She then passes back individual tests, advises the students to fold them in half, and after students have had an opportunity to review their tests results, the tests are destroyed. The exception to that is the final spelling tests and group projects completed by students together.

Teacher ____ indicates that ____ never called her by telephone, never spoke to her personally, nor attended a conference to meet with her regarding her procedure. ____'s child never mentioned to her any concern or

> objection to any process being used in the classroom. It is impossible for Teacher ____ to now identify which test ____ is referring to, and since October 6, 1998 was a Tuesday, she believes it was unlikely that it was a final weekly test.

Under FERPA, the term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(4); 34 CFR § 99.3 "Education records." There are several types of records which are specifically excluded by FERPA from the definition of education records, including "sole possession records" which will be discussed below. Under FERPA, a school may not generally disclose personally identifiable information from the education records of a minor student unless the student's parent has provided written consent. 34 CFR §99.30. There are several exceptions to FERPA's prohibition on nonconsensual disclosure of education records. However, none of those exceptions apply to this situation. Since Ms. ____ is unable to identify more specifically which of her daughter's education records or which test she is alleging the District improperly disclosed, this Office does not have sufficient evidence to further investigate her allegation. Therefore, this Office finds that the District did not violate FERPA as alleged by Ms. ____. Ms. ____ will be informed of our finding by copy of this letter.

Please note that in addition to conducting investigations of alleged violations of FERPA, this Office is responsible for providing technical assistance to educational agencies and institutions regarding FERPA. Notwithstanding the fact that Ms. ___ is unable to identify the test at issue, it appears that there may be some confusion on the part of the District regarding the definition of education records and what constitutes disclosure of an education record. Below is

technical assistance for the District to clarify FERPA in those areas.

In her March 19 response on behalf of the District, Ms Storaasli states:

> The opinion issued by LeRoy S. Rooker on Complaint No. ____ dated December 20, 1996 related to final graded papers, tests and projects which had been submitted to the teacher, evaluated and graded, and were then being returned to class members.
>
> . . . If ____'s complaint arises from a spelling pre-test, it has not yet been turned in to the teacher. If it arises from a portion of a chapter test, the teacher has not yet viewed or corrected any portions of the student's test. In either case, no grades have yet been assigned. If they are not "maintained" by the teacher or school, they have not yet become education records subject to FERPA . . . .

As stated above and in the December 20, 1996, finding in complaint number ____, the term "education records" encompasses records directly related to a student and maintained by an educational agency or institution. Please note that if a student's name or other personally identifiable information is provided on the test, then the test is directly related to that student. If the classroom teacher collects the test, then the test is maintained by the District and meets the definition of an education record subject to the privacy protections of FERPA. Also, if a test is collected by the teacher, even though the teacher has not reviewed or graded it, the test is an education record subject to FERPA. Please note that in the December 20 finding in complaint number____ this Office stated:

> . . . Clearly the *content's* of [the student's] written reports and projects, *as well as* the grades received for them, are education records as that term is broadly defined.

(Emphasis added.) Ms. Storaasli continues:

> If the test correcting exercise is pedagogical in nature and the teacher is utilizing it for the learning purposes of the entire class, whether graded or not, ISD No. 709 maintains that it is not educational data unless and until the grade is recorded in the teacher's grade book. An analogy could be that a teacher certainly has the authority to request student's to write spelling words or work math problems on the chalk board in the presence of other students and this would not be a violation of FERPA. Correction of spelling pre-tests and "true-false" or matching portions of chapter tests is pedagogical in nature and is used by the teacher for the learning purposes of the entire class.

FERPA protects personally identifiable information contained in student education records from improper disclosure to third parties by educational agencies and institutions. FERPA does not apply to disclosures of information by students or parents. Thus, Ms. Storaasli is correct that it would not be a violation of FERPA for a teacher to have a classroom learning exercise in which students "write spelling words or work math problems on a chalk board in the presence of other students." However, FERPA would not generally permit a teacher to conduct a classroom learning exercise in which the teacher discloses personally identifiable information from one student's education records to one or more of the other students. Thus, the teacher would not be permitted, under FERPA, to collect student true-false tests (at which point the tests would be maintained by the District) and distribute each test for correction to a student other than the student who completed the test. In this instance, the teacher would be disclosing each student's test or education record to a third party without prior written parental consent. Based on the information in Ms. Storaasli's response, it appears that the "chapter tests" may have been collected by Ms. ____ (thus maintained by the District) and each test later distributed for correction to a student other than the student who completed

the test. If this is the case, the District should ensure that all school officials are aware that such a practice would not be permitted under FERPA and should be discontinued.

For your information, there is a slight variation on the above procedure for correcting tests and providing a classroom learning exercise that would not be in violation of FERPA. Prior to collecting the tests, the teacher could direct the students to exchange tests with each other for the purpose of correcting the tests. After the tests are corrected and the classroom learning exercise completed, the teacher could then collect the tests for grading. Not until the tests were collected (thus, maintained by the District) would they be education records subject to FERPA.

In her March 19 response, Ms. Storaasli states:

> . . . Even assuming the uncorrected spelling pre-tests or portions of chapter tests are educational data under FERPA, which is disputed, FERPA creates an exception for certain information held by teachers.

Ms. Storaasli cites FERPA's sole possession records exception to the definition of education records and continues:

> . . . the spelling pre-tests and portion of chapter tests which are components of the student's grade, which are not revealed by the teacher to any other individual except a substitute teacher, are not educational data. Thus, the test results before or after they are recorded in the teacher's records are not educational data under the meaning of the law. Therefore the in-class correcting process would not be a violation of FERPA. There is no allegation that Teacher ____ allowed students to see the tests of other students that had already been recorded in the grade book. . . .

As stated above, there are several types of records which are specifically excluded by FERPA from the definition of education records, including "sole possession records." Sole

possession records are records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not revealed to any other person except a temporary substitute for the maker of the record. 34 CFR § 99.3 "Education records." This exemption generally refers to informal notes or "memory joggers" made by a teacher or other school official about a student. A student's completed test paper would not meet the definition of a sole possession record in that it would include information provided by the student, i.e., the student participated in the creation of the record. Also, as with education records, FERPA protects the privacy interests of parents and students with regard to personally identifiable information contained in sole possession records. Thus, as with education records, personally identifiable information contained in sole possession records may not be disclosed to third parties without prior written consent.

Thank you for your cooperation with regard to the resolution of this complaint. If you have any questions regarding our finding or technical assistance we have provided, you may contact Mr. Ricky Norment of my staff at 202-260-3887.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Ms. ____

Mr. Andrew Marko
Superintendent
Wyoming Valley West School district
450 North Maple Avenue
Kingston, Pennsylvania 18704

June 25, 1998

Dear Mr. Marko:

This is to advise you of the finding in the complaint filed with this Office against the Wyoming Valley West School District (District) by Mr. and Mrs. _____. Mr. and Mrs. _____ alleged that the District violated their rights under the Family Educational Rights and Privacy Act (FERPA) when it failed to provide them access to the education records of their son, _____, within 45 days of their request. Specifically, the _____ state:

> When we asked to review the teacher grade book to determine what assignments were incomplete, we were told by Mr. _____ that we could not see this information. We then requested a meeting with the school principal, Mr. Timothy McGinley, to ask for access to this information. We were told by Mr. McGinley that teacher grade books are private and we had no right to review them. . . . [Mr. Marko] denied our request for access to the assessment information. . . .

By letter dated August 11, 1997, you were informed of Mr. and Mrs. _____'s complaint and asked to provide a written response. You responded by letter dated September 4, 1997. In your response, you state in relevant part:

> As you indicate in your letter of August 14, 1997, Mr. and Mrs. _____ indicated in the complaint that Mr. _____ . . . indicated to them that they could not see the grade books. . . .

> Mr. McGinley upon meeting with Mr. and Mrs. _____ informed them that a teacher's grade book is considered a "sole possession record". . . .
>
> A meeting was in response to Attorney Michael Bradey's request for records was convened in my office on February 25 19[9]7 . . . The _____ indicated a wish to see the grade books from the 1995-96 school year at the meeting and were informed that these are sole possession records and in all likelihood would have been destroyed by the teachers at this point in time. . . .

Under FERPA, a school must provide a parent with access to his or her child's education records within 45 days of the receipt of a request. 20 U.S.C. § 1232g(a)(1)(A) and (B); 34 CFR § 99.10. The term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 "Education records."

Exempt from the definition of education records under § 99.3 of the FERPA regulations are "sole possession records." Sole possession records are defined as records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except the temporary substitute of the maker of the record. FERPA's sole possession exception is strictly construed to mean "memory jogger" type of information. For example, the exception includes information that a school official uses as a personal reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals. A teacher's grade book does not meet the sole possession record exception under FERPA. Thus, the District violated FERPA when it failed to provide Mr. and Mrs. _____ access to _____'s grades in the teacher grade books. The _____ will be

informed of our finding by copy of this letter. Please note that in a situation where a record, such as a grade book, contains information on more than one student, the parent requesting access may inspect, review, or be informed of only the specific information about his or her child.

In order for this Office to close the investigation of this complaint, please provide this Office with assurance that Mr. and Mrs. _____ have been provided an opportunity to inspect and review _____'s grades in the teacher grade books as requested. Also, please provide assurance that appropriate officials in the District, including Mr. _____ and Mr. McGinley have been apprised of FERPA as outlined in this letter of finding, including the distinction drawn between an education record and a sole possession record. Please provide us with the requested information within three weeks of your receipt of this letter.

Thank you for your continued cooperation with regard to the resolution of this complaint.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office